

changing e-context must be eclectic. The challenge is to merge characteristics such as “due process,” a “level playing field,” and “neutral adjudication” (the best of the state court system) with the flexibility, informality, and responsiveness to the needs of the parties (the best of the ADR system), and so to create a paradigm of dispute resolution that meets the needs of e-commerce. I analyze ADR as a practical instrument to resolve the rather messy problems that “the law of places” may impose on the “the world of messages.” Jurisdictional questions² and the problem of forum non conveniens³ render the existing state court system irrelevant, as a practical matter, to resolve most e-commerce disputes, especially in the consumer versus e-merchant context. Further, nation-states already are preparing to abandon conventional dispute resolution techniques in cyberspace and encouraging the development of ADR as a means of online dispute resolution.⁴ In the long run, ADR may not surrogate to the state courts, but in the e-context, eventually supplement it, surpass it, and ultimately largely replace or displace the state court paradigm as the primary means for formal binding resolution of online disputes.

First, I must concede that my introduction may be a bit misleading, that although I use the generic term “ADR,” I will limit myself to discussing binding arbitration.⁵ Second, many of the problems that identified presentation are not unique e-commerce. Most are short comings of the

² See Yvonne A. Tamayo, *Who? What? When? Where?: Personal Jurisdiction and the World Wide Web*, 4 RICH. J.L. & TECH. 7, ¶¶ 9–10 (Spring 1998) <<http://www.richmond.edu/~jolt/v4i3/tamayo.html>>; see also *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997).

³ See, e.g., Alejandro E. Almaguer & Roland W. Baggott III, Note, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 712–13 (1998); see also *GTE New Media Servs., Inc., v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000).

⁴ See Office of the Whitehouse, *A Framework for Global Electronic Commerce: Uniform Commercial Code for Electronic Commerce* (visited Apr. 8, 2000) <<http://www.ecommerce.gov/framework.htm#3>>; see also e-Europe: An Information Society for All Progress Report (visited May 5, 2000) <http://europa.eu.int/comm/information_society/eeurope/pdf/progrep_en.pdf> (encouraging alternative consumer redress mechanisms, online dispute settlement, and “link[ing] of existing alternative dispute resolution schemes in a pan-European network (European Extra-Judicial network – EEJ-net)” for the 15 nation European Union).

⁵ There are many reasons for this precise focus. Binding arbitration transforms an informal process into a quasi-judicial process that concludes in a formal state court judgment that is entitled to be enforced. Courts enforce arbitral awards that would be totally illegitimate had the award been initially the result of judicial proceedings.

consumer arbitral process, whether the arbitration is virtual or in person.⁶ What I do assert is that because the Internet is a contract-making machine, because of the inherent difficulties of creating formal state-sponsored dispute resolution mechanisms,⁷ and because of the modern trend rendering all disputes, whether statutory or contractual, as subject to arbitration,⁸ the dangers of arbitration to consumers are both quantitatively and qualitatively different in the online context. Unlike in the real world where there is a strong tradition of seeking remedies in the state sponsored courts, there is no such tradition in e-commerce.

The tentative online legal paths that we establish today may become the settled expectations of tomorrow and ultimately affirmatively enshrined into state law in the future. Since e-commerce norms are largely *tabula rasa*, this is the appropriate time to examine critically real world institutions and import into the online world those institutions which meet existing and future needs for fairness and efficiency. This Article examines the role of "privacy" in arbitration in the land of places and what its role should be in a world of messages.

II. WHY PRIVACY IN ONLINE ADR?

Consumer privacy interests in cyberspace are important, but countervailing public interests may require disclosure of online arbitral proceedings or, at least, the arbitral award. The possibility of keeping the arbitral process and award private is one of the elements of alternative dispute resolution that separates it from the public courts, which are presumptively open to the public. Frequently, institutions and individuals choose arbitration solely in the hope of keeping some facts private.⁹ This secrecy is sanctioned for numerous reasons, one of which is that the public generally has no interest in the resolution of a private dispute. If the dispute arises out of a contract, private law creates the private ordering of parties who selected a private method of resolving their dispute. But, if the dispute

⁶ Cf. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997).

⁷ See Llewellyn Joseph Gibbons, *Rusticum Judicium? Private "Courts" Enforcing Private Law and Public Rights: Regulating Virtual Arbitration in Cyberspace*, 24 OHIO N.U. L. REV. 769, 775-78 (1998).

⁸ Eric James Fuglsang, Comment, *The Arbitrability Of Domestic Antitrust Disputes: Where Does The Law Stand?*, 46 DEPAUL L. REV. 779, 807-08 (1997).

⁹ See Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 984 (1997).

involves the interests of more than the actual parties, for example the arbitration of a hybrid statutory and contract claim, then privacy interests in the arbitration must be weighed against the public's interest in the arbitration.¹⁰

In the world of matter and geographically defined sovereignties, arbitration is an *alternative* form of dispute resolution to the state sponsored courts. In the world of bytes and overlapping and conflicting sovereignties, state sponsored judicial dispute resolution may become the alternative to the new dominant paradigm of binding arbitration. As arbitration supplants the public judicial processes, one must consider those aspects of the judicial process that should be public even if the judicial process is an arbitral proceeding. If adjudication solely affects the interests of the parties before the arbitrator, then a perfectly confidential procedure is justified. But as the interests of the public are implicated, then the public has a correspondingly greater right to disclosure.

As arbitration begins to define public (statutory) rights or interpret standardized forms (which have the nature of being private legislation running against all the world), the arbitrator and the arbitral institution¹¹ should consider making at least the award, if not the arbitral proceeding, open. While absent a contractual obligation to do so, prior arbitral awards are not binding in future disputes, a wise arbitrator will consider a well-reasoned opinion of a prior arbitrator as part of the process of interpreting the disputed

¹⁰ This balancing of privacy with public disclosure is not new. For example, section 105 of the Patent Law Amendments Act of 1984 permits the parties to a patent interference claim to arbitrate their dispute, but before the award is enforceable, the Commissioner of the United States Patent and Trademark Office must be notified of the award. *See* Patent Law Amendments Act of 1984 § 105, 35 U.S.C. § 135(d) (1994). Surprisingly, while the Commissioner must be notified of the award, there is no requirement that the arbitrator issue a reasoned award. *See* 2 PETER D. ROSENBERG, PATENT LAW FUNDAMENTALS § 10.07 (2d ed. 1980).

¹¹ I assume most arbitration in cyberspace will be institutional rather than ad hoc. Already arbitral institutions are crafting rules to govern consumer disputes. *See, e.g.,* Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 8; Better Business Bureau, *Better Business Bureau Dispute Resolution* (visited Apr. 8, 2000) <<http://www.bbb.org/complaints/bindarb.html>>. *See generally* New JAMS/ENDISPUTE Policy on Procedural Fairness in Consumer Disputes, 9 WORLD ARB. & MEDIATION REP. 177 (1998). In addition, the Internet Corporation for Assigned Names and Numbers (ICANN) has already accredited three institutions to administer arbitration over Internet domain names. *See Internet Corporation for Assigned Names and Numbers* (visited Apr. 20, 2000) <<http://www.icann.org/udrp/udrp-schedule.htm>>. The three organizations are the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), and e-Resolution (DeC). *Id.*

term in a future arbitration.¹² If this body of "precedent" does exist, it may crystallize into the customary law of the contract or the industry. If arbitral awards are going to become "precedent" for a "common law" or "customary law" of global e-commerce,¹³ then they must be public and well-reasoned, lest institutional repeat players selectively choose which arbitral opinions or awards to release to the public and which to keep secret,¹⁴ and so distort the developing "law" of e-commerce. Finally, arbitrators are neutrals, but they are also human, and as such they have certain propensities, and absent public-reasoned awards, institutional repeat players may develop special competency in arbitrator-shopping so as to tilt the lopsided playing field against the one-time consumer grievant.

III. PRIVACY IS POSSIBLE IN ONLINE ARBITRATION

The private nature of the arbitral process may be protected through the use of technology and the judicious use of public law and the private law of contracts.¹⁵ The term "code" has several meanings in the e-context, as follows:¹⁶ first, code as in the software and hardware that provides for the interconnectivity that is the Internet;¹⁷ second, code as in the public laws of

¹² See Calvin William Sharpe, *NLRB Deferral to Grievance-Arbitration: A General Theory*, 48 OHIO ST. L.J. 595, 627 & n.265 (1987). See Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 536 (1997) ("reasoned opinions will be increasingly relied on both by disputants and by subsequent arbitrators—so that despite a general understanding that stare decisis does not operate here, a sort of 'common law' may emerge").

¹³ One of the goals of online arbitration has been to create a customary law of cyberspace through the use of well-reasoned, persuasive, arbitral awards. See Almaguer & Baggott, *supra* note 3, at 721–22; Rau, *supra* note 12, at 537 ("Opinions may be equally useful for parties to standardized transactions that may be expected to give rise to a number of similar and often-recurring disputes . . .").

¹⁴ Cf. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 101–04 (1974) (commenting on methods used by repeat players to manipulate the creation of legal rules through the selection of which cases to litigate and which to settle).

¹⁵ Although most of the contracts to arbitrate that will take place as part of e-commerce will be mass-market shrinkwrap, click-wrap, or similar contracts of adhesion, they are enforceable. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 112 (1993).

¹⁶ See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 20–21 (1999).

¹⁷ See *id.* at 6.

the jurisdictions that the Internet envelops;¹⁸ and, finally, code as in the private ordering of individuals, either through settled expectations, customary behavior, or that created through the private law of contracts.¹⁹ Because compliance with the software and hardware codes of the Internet is implacable and merciless in its exacting requirements, this Article will discuss technological solutions to the privacy problem first and then proceed to discuss the legal solutions.

A. Technology

E-commerce merchants are well aware of the risks of doing business online. The problems facing the online arbitrator are similar to the problems facing the e-merchant. The arbitrator must be concerned with unauthorized access,²⁰ data alteration,²¹ monitoring,²² spoofing,²³ service denial,²⁴ and repudiation.²⁵ Technology used to solve these problems for commercial entities may meet the needs of the online arbitrator. Already, there are arbitral institutions providing online arbitration, and some of these institutions have taken steps to assure the confidentiality of the communications.²⁶

The parties should consider this issue in their submission.²⁷ Arbitral institutions should provide guidance on the use of encryption technology.

¹⁸ See *id.*

¹⁹ See Gibbons, *supra* note 7, at 776.

²⁰ "Unauthorized access: Someone accesses or misuses a computer system to intercept transmissions and steal sensitive information." Netscape, *Securing Your Site for E-Commerce* (visited Apr. 8, 2000) <<http://www.netscape.com/security/securesites/ecommerce.html>>.

²¹ "Data alteration: The content of an e-commerce transaction—user names, credit card numbers, and dollar amounts—is altered en route." *Id.*

²² "Monitoring: A hacker eavesdrops on confidential information." *Id.*

²³ "Spoofing: A virtual vandal creates a fake site masquerading . . . as yours to steal data from unsuspecting customers or just disrupt your business." *Id.*

²⁴ "Service denial: An attacker shuts down [a] site or denies access to visitors." *Id.*

²⁵ "Repudiation: A party to an online purchase denies that the transaction occurred or was authorized." *Id.*

²⁶ CyberTribunal, for example, has the computer equipment necessary to provide a guarantee of perfect *confidentiality* to those who take advantage of its services. Thus, for example, the information related to each case will be accessible to only the parties concerned, the Secretariat, and the mediator or the arbitrator. See Verio, *The New World of Business: Security Solutions* (visited Apr. 8, 2000) <<http://www.cybertribunal.com>>.

²⁷ Because arbitration is a creature of contract, the submission defines the power (jurisdiction) of the arbitrator, selects the "question" or "issue" presented and the

Ultimately, because of the rate at which this technology changes the choice of encryption technology, it should be left to the arbitrator.²⁸

B. Legal Environment

Because of the potentially transnational nature of cyberspace, the laws of many different jurisdictions may protect all or part of the arbitral communication.²⁹ There are at least two legal regimes that may protect the confidentiality of an e-arbitration.³⁰ The first regime is contained within public laws, which prohibit third-party interception of electronic communications. The second is given form by private laws that the arbitrator, arbitral institution, and the parties to the arbitration will make to govern the arbitral process, and which will prohibit the private dissemination of information regarding the arbitration. Both regimes are required to begin to create an effective law of privacy to govern the arbitral process.

1. Electronic Crime Laws

There are many different legal regimes which may impose criminal or civil penalties for the unauthorized access or interception of confidential arbitral processes. This subpart will briefly describe the following two paradigmatic approaches: first, the federal Electronic Communications

potential scope of the remedy to the arbitration. *See* Malecki v. Burnham, 435 A.2d 13, 14 (Conn. 1980).

²⁸ Because of the rate at which Internet technology is evolving, this Article does not discuss any specific technology in any detail, under the assumption frequently borne out by experience that the technical discussion in a law review is frequently only of historical interest once the article is published.

²⁹ *See* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation*, 6 CORNELL J.L. & PUB. POL'Y 475, 489 (1997). As I have previously observed,

Dynamic routing may deliver a message or even parts of the same message by taking different routes to the destination, depending on the most efficient path. . . . A message sent *via* e-mail from Berkeley, California to Seattle, Washington is frequently routed: Berkeley, to Santa Clara, to Washington, D.C., to New York, to Cleveland, to Chicago, to San Francisco, to Seattle.

Id.

³⁰ To the degree that there are laws that may recognize that the content of the communication has independent value and that protect the content of the communication, then in this context there may be other regimes to protect e-arbitration. *See, e.g.*, Computer Abuse Amendments Act of 1994, 18 U.S.C. § 1030 (1994 & Supp. IV 1998); RESTATEMENT (THIRD) OF UNFAIR COMPETITION LAW § 41 (1995). A discussion of these laws is outside the scope of this Article.

Privacy Act and then, some thematic principles frequently found in state computer fraud or computer abuse acts.

a. Electronic Communications Privacy Act

Perhaps the most important federal law protecting online communications is the Electronic Communications Privacy Act of 1986 (ECPA).³¹ The ECPA protects wire, oral, and electronic communication.³² Electronic communication is any "transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical systems that affects interstate commerce."³³ The ECPA treats the interception of "data" in transmission differently from stored data.³⁴ Generally, under the ECPA, the interception of data is treated more seriously than unauthorized access or disclosure of the data. For the purposes of this discussion, these differences are not significant. Suffice it to say that unauthorized interception or access could result in severe criminal penalties, civil damages, and injunctive relief.

b. State Laws

States are prosecuting computer crimes aggressively, and unauthorized access or interception of the online arbitral proceeding probably would violate one or more state laws.

Since Florida adopted the first specialized state computer crime statute in 1978, almost every other state has adopted some criminal provision to protect computer technology.³⁵ State laws tend to address technology-specific issues involving computer crime. For example, generally state laws expand common law definitions of property to provide explicit protection for computer data.³⁶ In addition to punishing cyber-vandalism, the altering or destruction of data, states also explicitly prohibit an individual from knowingly using or accessing the system beyond the scope (permission) given that individual. In some sense, this might be considered the cyberian

³¹ 18 U.S.C. § 2510 *et seq.* (1994 & Supp. IV 1993).

³² See *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 460 (5th Cir. 1994).

³³ 18 U.S.C. § 2510(a).

³⁴ 18 U.S.C. § 2511.

³⁵ See Xan Raskin & Jeannie Schaldach-Paiva, *Computer Crimes*, 33 AM. CRIM. L. REV. 541, 563-65 & n.153 (1996).

³⁶ See *id.* at 564-66; see also Anne W. Branscomb, *Rogue Computer Programs and Computer Rouses: Tailoring the Punishment to Fit the Crime*, 16 RUTGERS COMPUTER & TECH. L.J. 1, 32-36 (1990).

equivalent of a prohibition of "trespassing." Some of these access statutes explicitly prohibit cyber-voyeurism, the accessing and viewing of the data even if the data is unaltered and the voyeur takes no action in regard to using the data.³⁷ In addition to criminal penalties, some state laws explicitly provide for civil causes of action.³⁸

2. Confidentiality Agreements

Although there is no presumption that any given arbitral process will be kept confidential, there are several possible sources of law that can protect the confidentiality of the arbitral process. Parties to the arbitration may agree expressly to a confidentiality clause in the arbitration agreement.³⁹ The rules of the arbitral institution may so require.⁴⁰ Or, the default rules of the situs of the arbitration may so require.⁴¹ Under any of the above sources of law, the parties are free to contract for some confidentiality provisions, to protect the relevant interests of the parties to the arbitration.⁴² Disputes arising out of the breach of the confidentiality of the arbitration provision may be relitigated before the same arbitrator as a continuation of the earlier dispute or incidental to the effectuation of the remedy; they may be the source of future arbitrations, or they may serve even as a dependent or independent basis on which to commence proceedings in a state court.⁴³

³⁷ See Branscomb, *supra* note 36, at 36; Raskin & Schaldach-Paiva, *supra* note 31, at 573, 566 n.170 (citing MO. REV. STAT. § 569.095(5) (Supp. 1996); W. VA. CODE § 61-3C-12 (1992)).

³⁸ See Raskin & Schaldach-Paiva, *supra* note 35, at 564 & n.160.

³⁹ See Hans Bagner, *Confidentiality in Arbitration*, INT'L ARB. REP., Jan. 1999, at 18, 18.

⁴⁰ See, e.g., ARBITRATION RULES FOR COMMERCIAL DISPUTES Rule 15 (American Arbitration Ass'n 1993) ("The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary"); UNCITRAL ARBITRATION RULES Arts. 25, ¶4 and 32, ¶5 (United Nations Comm'n on Int'l Trade 1976) (providing, respectively, that "[h]earings shall be held *in camera* unless the parties agree otherwise," and that "[t]he award may be made public only with the consent of both parties"); WIPO ARBITRATION RULES Arts. 73-76 (World Intellectual Property Org. 1994).

⁴¹ See Bagner, *supra* note 39, at 19-20.

⁴² Obviously, there may need to be some disclosure of the arbitral award. If company A's distributors receive a cease and desist letter from company B alleging that A is infringing B's intellectual property rights, and the arbitrator resolving the dispute between A & B finds that there is no infringement, A must be able to notify A's distributors of the arbitral award. Depending on the facts, A also may need to provide the distributors with additional information.

⁴³ For example, contracts may contain terms that courts normally would not enforce under traditional contract principles such as "fraud," "unconscionability," or "unfair surprise." Whether such challenges to the contract are for the court or the arbitrator

C. Existing Technology and Laws Adequately Protect the Possibility of Confidential Arbitral Proceedings

Strong encryption provides a strong powerful code on which to build confidentiality into arbitral proceedings. To the degree that the human element weakens the technological protection provided by encryption, at least in the United States and in many individual states, there is strong legal protection against unauthorized interception. Statutory prohibitions against computer crimes provide for significant legal penalties, terms of imprisonment, fines, and other criminal sanctions. There is also the possibility for civil damages, both actual and punitive, to deter unauthorized or unlawful interception or disclosure of protected arbitral communications. Finally, parties to the arbitration may control disclosure among themselves through legally enforceable confidentiality agreements. Consequently, the dangers of unauthorized interception or disclosure of a cyberspace arbitral proceeding seem to be no greater than if that same proceeding took place offline in the more traditional room.

IV. THE PARTIES RIGHT TO ARBITRAL PRIVACY VERSUS THE PUBLIC'S RIGHT TO KNOW

Traditionally, the public had little interest in learning about private disputes between private parties, so disputes and their resolution remained private unless the parties made the dispute a matter of public concern by seeking the intervention of a judge and the use of state power to resolve that dispute. This Part considers whether the private law arbitration model is appropriate where mass market contracts (licenses) are at issue, with numerous consumers having the same terms in their contract, giving them an interest in how these terms are interpreted and enforced through arbitral proceedings.

to decide is in dispute. *Compare* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943–44 (1995) with Prima Paint Corp. v. Flood & Conklin Manf. Co., 388 U.S. 395 (1967). Unfortunately, if the scope of the arbitration is submitted to the arbitrator, arbitrators are not bound to apply the law of any specific jurisdiction, and arbitration awards are not reviewable for errors of law or fact unless the arbitration demonstrates a manifest disregard for the law. See Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132 (6th Cir. 1996); JAY E. GREINIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS § 20.12 (2d ed. 1990). See generally Stephen L Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 449–89 (1998)(discussing statutory and non-statutory grounds for vacating an arbitration award).

A. *Traditional Model of Arbitration*

The traditional model of arbitration was the resolution of a private dispute between two parties. Most often, the dispute arose out of the private ordering of the relationship between the parties through a bargained-for contract. The parties, having created the private law governing their relationship, often also provided for the resolution of disputes arising out of the relationship through private adjudication. Parties may agree upon private adjudication (the “arbitration clause”) either in the contract creating the initial ordering or in a subsequent agreement to resolve the dispute privately. Further, the disputes tended to arise between parties of relatively equal bargaining power, each of whom had a desire to maintain an ongoing relationship that grew out of a negotiated, bargained-for contract. Since the parties were usually of relatively equal strength and sophistication, they were able to game the risks and rewards of arbitration versus state court adjudication. Further, assuming that these sophisticated parties to arbitration agreements entered into the agreement to arbitrate in good faith, neither party knew *ex ante* on which side of the arbitral processes it would be. Therefore, in a Rawlsian sense, they bargained for a level playing field.⁴⁴

The future parties to the arbitration knew the rules of the institution they selected to administer the arbitration and generally provided for the selection of the arbitrator. With neither side knowing the issue on which arbitration would be demanded, each had an incentive to create a process designed to produce a neutral arbitrator. There were many methods of selecting an arbitrator. Perhaps one of the most common was the arbitral institution providing a list of names, with each party striking names until whoever was left would be the arbitrator. The process of choosing an arbitrator under this system is characterized by informational symmetry. In the traditional arbitration, parties have similar information symmetry regarding arbitrator propensities, biases, and prejudices based on prior experience with the arbitrator or the arbitrator’s reputation in the community.⁴⁵ Both sides are equipped with sufficient information to strike the arbitrators who appear to have the strongest propensity to favor the other side.

⁴⁴ See JOHN RAWLS, A THEORY OF JUSTICE 11–12 (1971).

⁴⁵ I am not using terms like bias or prejudice in an invidious sense. The fact that under similar circumstances an arbitrator has ruled in favor of one party may be significant, particularly in future cases involving similar facts. Or, depending on a party’s case, she may prefer an arbitrator who is more or less formal, or who applies procedural rules aggressively rather than reaching issues on the merits. These are human factors that may tilt the playing field in favor of one party, and in the case of repeat players, give them the house advantage. See *infra* note 47 (discussing “house advantage”).

Finally, while neutral, an arbitrator is an individual who makes his living by private adjudication. The parties before the arbitrator are paying for her services. These are clients that must be kept happy. For some, this leads to a perception that arbitrators try to halve the dispute, that is, to give something to each of the parties appearing before the arbitrator.⁴⁶ Each party to a traditional arbitration dispute is more or less equally likely to engage the arbitrator in the future for additional services, thus potentially keeping in balance the arbitrator's personal interests in future employment and the parties' interest in neutral adjudication of the dispute.⁴⁷

B. *New Online Model of Arbitration*

The new online model of arbitration most likely will involve disparate power relationships. Sophisticated, large, e-commerce institutions with well-written mass market contracts containing *ad terrorem* terms that few state sponsored courts would enforce may be presented to individuals who then will not have a realistic opportunity to bargain or reject them.⁴⁸ Unsophisticated consumers will not realize the significance of an arbitration clause, for several reasons. Consumers do not purchase goods or services with the anticipation of receiving defective goods or services and thus foresee no need for a "legal" remedy.⁴⁹ Consumers may not realize the significance of a contract term such as, "any dispute will be resolved under the rules of the International Chamber of Commerce."⁵⁰ Innocuous terms such as these may cost consumers significant legal rights.

⁴⁶ See Rau, *supra* note 12, at 520.

⁴⁷ "[I]n continuing arbitrations between two repeat players, offsetting biases may themselves prevent too great a distortion of judgment." Rau, *supra* note XX, at 524.

⁴⁸ Unbargained for contracts tend to be drafted from the gray edge of the legally permissible and often into the realm of terror, because there is no countervailing normative force and because these contracts will often remain either unread or untested in the courts. Cf. William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 GEO. J. LEGAL ETHICS 799, 827 (1993); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1172, 1222, 1224 (1984).

⁴⁹ See Paul Slovic, *Facts Versus Fears: Understanding Perceived Risk, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 465, 465 (Daniel Kahneman & Amos Tversky eds., 1982).

⁵⁰ Cf. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 570 (N.Y. App. Div. 1998).

ANOTHER LOOK AT PRIVACY, ARBITRATION, AND GLOBAL E-COMMERCE

For example, in *Brower v. Gateway 2000, Inc.*, the contract was an enclosure with other packing materials that accompanied the computer.⁵¹ The arbitration agreement read as follows:

Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce [(ICC)]. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.⁵²

The terms failed to communicate to the consumer that

the cost of ICC arbitration [is] prohibitive, particularly given the amount of the typical consumer claim involved. For example, a claim of less than \$50,000 require[s] advance fees of \$4,000 (more than the cost of most Gateway products), of which the \$2000 registration fee [is] nonrefundable even if the consumer prevail[s] at the arbitration. Consumers [may] incur travel expenses disproportionate to the damages sought [and] . . . bear the cost of Gateway's legal fees if the consumer did not prevail at the arbitration Also, although Chicago was designated as the site of the actual arbitration, all correspondence must be sent to ICC headquarters in France.⁵³

Clearly these are significant legal terms that were buried either intentionally or inadvertently in a generic arbitration clause.⁵⁴ Further, these terms tend to advantage the larger, more sophisticated institutional player by discouraging consumer claims.

So unlike the "Rawlsian" situation that traditional arbitration anticipates, large institutions, much like casinos, will calculate a house advantage,⁵⁵

⁵¹ *See id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ It is interesting to note that in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), Judge Easterbrook, writing for the court, considered only the enforceability of the agreement to arbitrate in his opinion. The court did not address the rules, conditions, or costs under which the arbitration would take place. *See generally id.* Yet, it ordered the parties to arbitration.

⁵⁵ With the sole exception of the game of Blackjack, most casino games start out with a statistically measurable advantage to the casino (the "house advantage"); this ensures that the casino will win in the long run. *Cf.* Mark T. Gould, *Blackjack and the Law*, ENT. & SPORTS LAW., Summer 1999, at 10, 10 (book review). Similarly,

knowing *ex ante* that more likely than not they are going to be the defendant in consumer litigation rather than the plaintiff.⁵⁶ Some scholars contend that under the modern arbitration paradigm, “individuals subject to arbitration clauses in form contracts are indeed at a substantive disadvantage if arbitration governs their disputes—i.e., arbitration does not protect their interests as well as litigation would.”⁵⁷ Finally, even if the arbitration is conducted on a procedurally level playing field, the consumer may be denied some legal remedies. For example, some arbitration clauses do not permit the arbitrator to grant punitive damages, injunctive relief, attorney fees, or to adjudicate “class actions.”⁵⁸

At least one court, in *Cole v. Burns International Security Services*, has considered the effect of repeat players on the resolution of statutory claims.⁵⁹ While the court did acknowledge that there might be a problem in a situation involving arbitrations between an employer (repeat players) and its employees (one-shot players) in resolving Title VII claims, the court failed to address adequately the concerns of the one-shot players.

Furthermore, [the court asserted that] there are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business. For one thing, it is unlikely that such corruption⁶⁰ would escape the scrutiny of plaintiffs’ lawyers or appointing agencies like the American Arbitration Association. Corrupt arbitrators will not survive long in the business. In addition, wise employers and their representatives should see no benefit in currying the favor of

institutional players can structure the arbitration so that they maximize the number of cases they win while minimizing damages in the cases that they do lose.

⁵⁶ Cf. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumer Informed Consent to Arbitration Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 276–77 (1999).

⁵⁷ Senderowicz, *supra* note 56, at 276–77.

⁵⁸ *Id.* at 277 & n.11.

⁵⁹ See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1467 (D.C. Cir. 1997). There is also empirical evidence of the repeat player effect, at least in the statutory employment discrimination arena. See generally Bingham, *supra* note 56. Professor Bingham’s work was based on the model established by Professor Mark Galanter in another area. There is no reason why Professor Galanter’s model should not work equally as well in modeling the relationships between e-merchants and e-consumers. See *id.*

⁶⁰ The issue is not necessarily corruption but merely subtle prejudice or bias for the repeat player—or even asymmetrical knowledge by the repeat player that can be used to the repeat player’s advantage.

corrupt arbitrators, because this simply will invite increased judicial review of arbitral judgments. Finally, if the arbitrators who are assigned to hear and decide statutory claims adhere to the professional and ethical standards set by arbitrators in the context of collective bargaining, there is little reason for concern.⁶¹

The *Cole* court's facile manner of addressing these concerns does not comport with the reality of one-shot player arbitration. For example, the court assumed that one-shot players will have attorneys and that the arbitrator will issue a reasoned written opinion that would be available to individuals not before the court, i.e., "published."⁶² Frequently, one-shot players appear pro se or with relatively inexperienced attorneys who are themselves one-shot players at representing individuals before arbitral tribunals. Second, the court overestimated the likelihood that the institution supporting the arbitration will discover these practices. Frequently, the bias will be subtle and systemic to the situation. Why should an arbitral institution differ with an arbitrator on the weight or credibility to be given to evidence or testimony? Further, there is no evidence of any systemic "check and balance" system in place at any arbitral institution to root out bias over numerous separate arbitrations.⁶³ Judges grant extreme deference to arbitral decisions.⁶⁴ Finally, absent a reasoned award in each case,⁶⁵ there is no basis on which to discover systemic bias on the part of an arbitrator.⁶⁶

⁶¹ *Cole*, 105 F.3d at 1485. But see generally Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum's Rulings Called One-Sided*, WASHINGTON POST, Mar. 1, 2000 (questioning the impartiality of an arbitral institution that may be heavily dependent on a single source or single industry for arbitral referrals and citing an example where a financial institution won 99.6% of the cases (19,618 for the financial institution versus 87 for consumers)).

⁶² *Id.*

⁶³ The panel in *Cole* implicitly explains why an arbitral institution check system is unlikely to work. The panel, when presented with survey evidence analyzing numerous arbitrations, observed that "[i]t is hard to know what to make of these studies without assessing the relative merits of the cases in the surveys." *Id.* Similarly even in the rare case of a reasoned award, it is hard to review the award for bias without re-arbitrating the underlying dispute.

⁶⁴ See *First Options, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); see also *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

⁶⁵ Arbitrators are generally not required to provide a written explanation or give reasons for their awards. See *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Arbitrators are required to provide written explanation if the rules of the arbitral institution or the submission so require. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 523 (1994). Historically, arbitrators issued bare awards to prevent challenges to the arbitration award, to retain the simplicity and flexibility of arbitration, and to reduce

C. Salutory Effect of Light on Arbitral Justice

As noted above, there are numerous problems arising from the intersection of institutional arbitration, repeat players, and one-shot players. Light will provide a salutary effect on the arbitral process; therefore, the first step should be to re-examine privacy in the context of e-arbitration, especially in disputes arising out of mass-market contracts. A mass-market contract to which hundreds of thousands or even millions of individuals are a party in a core fundamental sense takes on a character of more than just a mere contract; there is an inherent public interest in the interpretation and enforcement of the contract.⁶⁷ Published reasoned awards when the public interest so require.

1. Regulated Markets, Regulated Justice

Like every other commodity in cyberspace, there is a market for justice. Many of the most successful commercial sites in cyberspace are those creating a market. Such as, eBay and portal sites that implicitly lend their credibility to the online merchants using their sites. One aspect of a well-

the costs of arbitration. See DAVID E. ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 13-13, (1994 & Supp. 1999) (discussing the pros and cons of reasoned arbitral awards). The bare award is uncommon in international arbitrations. Born, *supra* note 65, at 523.

⁶⁶ As for the arbitrator's integrity and professionalism, the Author is second to none in admiring the conscientious diligence of every arbitrator that he works with. Yet parties should not rely *solely* on personal integrity when institutional checks and balances exist and when countervailing passions may promote the same result. But, in the end, I concede that personal integrity and professionalism is the ultimate safeguard.

⁶⁷ Some commentators have the judicial public from the private by looking to the functions of adjudication. See Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 31 (1979); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 321-22 (1995). Private disputes implicate private norms or the application of public norms to private acts because these disputes only implicate the interests of the immediate parties. See Fiss, *supra*, at 31. In contrast, public disputes implicate the interests of society. See *id.* Does this formulation apply to the following situation where the interpretation of a term for the dominant operating system license could potentially affect 80% of the personal computer users throughout the world? Clearly, it is a massive number of individual licensees (private norms), but collectively its interpretation must rise to the level of implicating the interests of society. While the parts the individual licenses are private, the whole is greater than the sum of the private licenses and is thus public. This hybrid-public-private law issue should be reported regardless of the dispute resolution options chosen by the parties.

regulated market is a consumer dispute resolution mechanism. Absent some effective method of resolving consumer disputes, consumers either will discount the value of their purchases to provide protection against the perceived risk, buy some sort of insurance, or refuse to enter the market. Alternatively, consumers will prefer and advantage those markets that are viewed as "fair" or those that create other regulatory mechanisms. The credit card industry has facilitated cyberspace as a market because it is the ultimate insurer of many transactions its merchant agreements and charge-back mechanisms. It is uncertain in the long run, however, that credit card issuers will want to remain the dispute-resolvers of last resort for e-commerce.

It is clear that a perception of fairness adds value to a market. As the e-market grows and shifts from informal dispute resolution or ad hoc procedures, both the appearance of fairness and the reality of fairness must be core values.⁶⁸ Already, the arbitral institutions are moving into the arena. Both the Better Business Bureau and the American Arbitration Association have promulgated cyberspace rules that are consumer friendly.⁶⁹

2. Level the Playing Field by Providing Greater Informational Symmetry

One of the most perplexing problems involved in creating or maintaining a dispute resolution system is that the participants must view that system as just. The system as a whole must satisfy some sense of equity on the part of the participants. The parties must have equal access to the facts and rules that have some bearing on their dispute. The decisionmaker must have some accountability for the decision. The parties should be able to anticipate the consequences of their actions and plan accordingly, and in a private resolution system, to the degree that it creates externalities that affect the larger public adjudication system, the public system should be on notice so that it can plan accordingly. This subpart will discuss the importance of informational symmetry.

a. Access Inequality

One reason why courts do not allow citation to unpublished opinions is the fear that repeat litigants will develop an expertise in litigating before

⁶⁸ There is much to be said for a market approach to this problem. Individuals valuing fair dispute resolutions should pay any additional costs for access to better dispute resolution mechanisms. Unfortunately, consumers tend not to value dispute resolution until after the dispute has occurred.

⁶⁹ American Arbitration Association, *Consumer Due Process Protocol* (visited Apr. 20, 2000) <http://www.adr.org/education/education/consumer_protocol.html>.

some judges such expertise is unavailable to future one-shot opponents who may litigate similar issues without the resources to collect the information used by repeat litigants to their advantage.⁷⁰ However, even without the ability to cite to unpublished opinions, repeat players obtain the expertise, they possess the reasoning contained in the unpublished awards, and they can use it—in the world of state sponsored courts, they may use it without citation, and in the world of arbitration, they are free to cite it as “precedent” for whatever weight the arbitrator is willing to give it.⁷¹

While arbitrators generally are not required to follow precedent, an arbitrator would be silly to ignore a prior well-reasoned arbitral award.⁷² The institutional repeat player, through its general counsel’s office or through the professional association representing that institutional player, will quickly have access to a variety of arbitral awards⁷³—a neat showcase of arbitral awards formed under different circumstances that can be used in the alternative to argue for or against any position the repeat player chooses to take in each arbitration. The one-shot player has no such arsenal of arbitral awards to choose from to cite as precedent for her position on interpreting the contract.⁷⁴ Accordingly, each and every award should be published⁷⁵ and

⁷⁰ See Kirt Shulldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 548, 550 (1997). The counter-argument is that the parties possessing access to these decisions should be banned from citing them or that the arbitrator is free to ignore them. The mere possession provides the possessor with a roadmap to prior arbitral reasoning (or at least a bare award) and therefore with disparate access. “Unfairness results from unequal access.” *Id.* at 566.

⁷¹ Even in the judicial context in which the no-citation rule can be enforced aggressively, this rule has been criticized severely by some commentators. See generally, e.g., Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235 (1998).

⁷² See JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 15.35, at 239 (2d ed. 1997) (“Past arbitration awards are not legally binding on an arbitrator, although they may be influential.”).

⁷³ See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 477 (1996) (“[I]t is common for large organizations and law firms that represent those organizations to keep databases containing extensive background information on each potential arbitrator, including how the arbitrator ruled in a number of cases as well as the quality of his decision.”).

⁷⁴ “A one-shot player who devoted any substantial time and resources to obtaining information about arbitrators or developing relationships with them would, by contrast, be acting irrationally because he would never have use for the information again.” Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum:*

citable. To the degree humanly and technologically possible, the one-shot players should have as much information as the repeat players.

b. *Arbitrator Accountability*

Reasoned awards and published awards go hand in hand with legitimizing arbitration as a source of law on the Internet. The public availability of arbitral awards is a check on arbitral abuse. Similar to judicial decisionmaking, “the light of day helps not only to assure fairness in fact, but, perhaps as importantly, to promote the appearance of fairness.”⁷⁶

[R]easoned opinions [are] one means of imposing transparency on the decision-making process and in particular, of imposing a certain self-discipline on the decision makers themselves. This is the phenomenon in which the . . . arbitrator supposedly finds—at the point where it becomes necessary to turn inclination into reasoned judgment—that it simply ‘will not write.’ Forced to think through the implications of [her] decision, [she] may in the course of explanation be surprised to find that it is not internally consistent, that it does not take into account all relevant interests, that it overlooks authority or ignores factual complexities. ‘[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interests, insufficient reflection, or simply excess haste requiring decision makers to have reasons may counteract some of these tendencies.’⁷⁷

If a reasoned award is issued, parties to the dispute are more likely to accept the legitimacy of the award, and if the award is published and made public, the public at large is more likely to develop confidence in the arbitral system.

Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 623.

⁷⁵ Publication means different things in different contexts. For example, publication may consist of just the bare facts, names of the parties, attorneys, and a general statement of issues before the arbitrator, and the actual award. *See, e.g.*, ROBBINS, *supra* note 65, § 13-10. The American Arbitration Association publishes similar information with the names of the parties redacted. *See id.* at 587. The preferred form of publication should include more than just a caption and a judgment; publication should also include, in some form, the arbitrator’s analysis of the facts and law that support the award.

⁷⁶ Shuldberg, *supra* note 70, at 567.

⁷⁷ Rau, *supra* note 12, at 527–28. Published reasoned awards will assist in keeping honest arbitrators honest, dishonest, disingenuous, or mendicant arbitrators will merely have to invest additional time and intellectual capital in harmonizing the award with the law and facts, and praying that they are not discovered.

c. Private Planning

If business institutions and consumers are aware of the “law” or persistent patterns of arbitral reasoning, they either may contract around this line of analysis or explicitly adopt it. Further, with greater information, both repeat players⁷⁸ and consumers may decide which disputes to “litigate” before the arbitrator and which to settle. If the governing rules are unsettled, then predicting the value of the dispute and its value to settle is problematic. This will lead to economically inefficient litigation.

d. State Planning

Arbitrators in e-commerce will be required to apply existing public law. Frequently, the issue may be before the arbitrator before a state sponsored court has had a chance to interpret the law in question or before the state sponsored courts have settled the law. Without published awards, executive agencies and legislatures will be unaware of the interpretations of, (and both the intended and the unintended consequences), of public laws. Without the information provided by the judiciary in the form of both statistics and reasoned opinions interpreting the law, it is difficult to determine the true effect of a law. Finally, to the degree that numerous private actions may indicate a systemic problem that needs a larger social or political solution, this barometer of public need is short-cuttled by the private arbitral process.

*3. Legitimize the Process and the Award**a. Costs*

If parties to a dispute move into a private method for resolving disputes, the old chestnut of “how much justice can you afford” takes on a new resonance. Currently, a portion of the substantial cost of providing justice is shifted from the litigants to the public at large. In e-commerce, private dispute resolution becomes one more cost of doing business. In the real world, consumers have easy access to inexpensive small claims courts for minor disputes. As a general rule, consumers should not pay more in arbitration costs than they would pay to litigate the same claim in a state

⁷⁸ A few states, for example, California and Texas, already require some de minimus disclosure. For example, California requires that the arbitrator disclose prior arbitrations involving attorneys or parties to the present arbitration and the results of the arbitration. CAL. CIV. PROC. CODE § 1281.9 (West Supp. 1998); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 172.103 (West Supp. 1998).

court.⁷⁹ Although there is an inherent appearance of impropriety or bias, large e-commerce institutions, especially those that create markets, should contract for and subsidize dispute resolution services through independent institutional administrators of arbitration services⁸⁰ or agree to use independent inexpensive services such as the Online Better Business Bureau.

b. Equality in Selecting an Arbitrator

Published awards are an excellent start in providing the one-shot player some opportunity to make a reasoned decision on who would be the best arbitrator for her claim. This includes information that may be useful in discovering bias or the appearance of impropriety.

4. May Result in a Customary Law of Cyberspace

"Courts, through their opinions, serve two paramount social functions: resolving disputes and enriching the supply of legal rules."⁸¹ Arbitral awards already serve the first social function, resolving disputes. Should state courts fail to serve these purposes in cyberspace, arbitral opinions may have to begin to serve the latter purpose of "enriching the supply of legal rules." In order to serve this important purpose, they need to be well-reasoned and published. Before an arbitrator relies on precedent to resolve a dispute, she should be convinced that all relevant "precedent" is before her, not merely a skewed sample. The only way to do this is to publish reasoned awards on unsettled issues.

⁷⁹ See generally Leslie L. Gardner, Note, *Resolving the Conflict Between Arbitration Clauses and Claims Under Unfair and Deceptive Practices Acts*, 64 B.U. L. REV. 377 (1984).

⁸⁰ The California Supreme Court's decision in *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903 (Cal. 1997), teaches us the importance of independent administration of arbitrations. Even if the e-commerce institutions select outside arbitral institutions to administrate the arbitration of dispute resolutions, the shared volume of revenue that one large e-merchant could potentially generate for a single arbitral institution is sufficient for many consumers to question the institution's continuing impartiality. See generally Mayer, *supra* note 61. If the arbitral institution is dependent on a few sources for much of its income, this could have at least the appearance of impropriety and may weaken the legitimacy of the arbitral process and the result in the challenging of the arbitral award. See, e.g., *Engalla*, 938 P.2d at 923-24 ("Contractual arrangements for non-judicial resolution of disputes must possess minimum levels of integrity.").

⁸¹ Shuldberg, *supra* note 56, at 548 (citing MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 4 (1988)).

V. WHEN TO PUBLISH

Clearly articulated standards of when to publish an award and when not to are needed. If the arbitration involves issues unique to individuals then there may be a presumption that the arbitrator would follow the expressed wishes of the parties in deciding whether to publish the award. But, if the parties cannot agree that the award should be confidential, or if the arbitrator finds that there is a competing public interest in disclosure, then the arbitrator or the institution supporting the arbitration must make an independent judgment as to whether the award should be published.⁸²

There are many factors that will enter into a decision as to whether to publish an award. First and foremost, the arbitrator's discretion should be guided by the rules of the institution supporting the arbitration. These rules do not have to be extensive or even mandatory, but the arbitrator should have guidance in making his decision on whether to publish. It will be impossible to provide for every contingency that may arise or that may need to be addressed in deciding whether to publish an award, but some ethical principles must be created that instruct the arbitrator that she has an ethical duty in making this determination to the public at large in addition to the duty that the arbitrator and the institution supporting the arbitration have to the parties to the dispute.

The United States Courts of Appeals have promulgated local rules to guide individual judges and panel decisions on whether to publish an opinion.⁸³ These rules serve as useful starting points to assist arbitrators, parties, and arbitral institutions in deciding whether to "publish" an award. The rules for the United States Circuit Court of Appeals for the District of Columbia provide a useful example of these rules.

An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment shall be published if it meets one or more of the following criteria: [the case resolves a substantial legal issue]; it is a case of first impression or the first case to present the issue in this court; it alters, modifies, or significantly clarifies a rule of law previously announced by the court; it calls attention to an existing rule of law that appears to have been generally overlooked; it criticizes or questions existing law; it resolves an apparent conflict in decisions within the circuit

⁸² The default rule should be, "when in doubt, publish." Rarely will there be a significant public interest in confidentiality in a mass-market e-commerce dispute. The arbitrator may always redact identifying information from the opinion accompanying the published award or just publish the award without any text explaining the underlying dispute.

⁸³ See, e.g., D.C. CIR. CT. APP. R. 36.

or creates a conflict with another circuit; [or] it warrants publication in light of other factors that give it general public interest.⁸⁴

This provides a sound basis for an initial screening of arbitral awards. Awards may be accompanied by a written opinion of the arbitrator explaining the award or a bare award may be published. The bare award would be, in essence, just the “judgment” of the arbitrator without explanation of the issues or reasoning of the arbitrator.

But there needs to be some process by which third parties who are aware of the award may suggest to parties and the arbitrator aware of the public interest in the award. Accordingly, a rule similar to that which follows may be in order:

Any person may, by motion made within 30 days after judgment or, if a timely motion for rehearing is made, within 30 days after action thereon, request that an unpublished opinion be published. Motions filed out of time shall not be considered unless good cause is shown. Motions for publication shall be based upon one or more of the criteria listed in subsection (a).⁸⁵

VI. WHERE TO PUBLISH

Actually, this is a simple question.⁸⁶ Already law librarians and researchers are considering the issues raised by digital publication;⁸⁷ as society develops more experience researching with and citing digital documents, these issues will be resolved. The Internet is a publication device.⁸⁸ Arbitral awards could be posted on the website of the institution that sponsored the arbitration in the case of institutional arbitration and on the website of the arbitrator in the case of ad hoc arbitration. Of course, the

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ I assume that there will be a market for these awards and that the market will provide the incentive for publication. But because the volume of these awards may make it difficult or expensive to publish in the traditional bound volume form, I am anticipating digital publication.

⁸⁷ See C. Anne Crocker, *The Official Version: Authenticating, Preserving and Citing Legal Information in Digital Form*, 26 INT'L J. LEGAL INFO. 23, 26 (1998) (discussing the following issues: (1) “the authentication of digital documents”; (2) “the preservation of digital information”; and (3) “the development of a standard, vendor-neutral citation system applicable to any format or media, past, present, or future”).

⁸⁸ Initially, this system may appear to be susceptible to fraud. The judicious use of encryption technology, however, may solve the problem: digital signatures and digital watermarks will create self-authenticating published arbitral awards. See Section of Science and Tech. Info. Sec. Comm., American Bar Ass'n, *Digital Signature Guidelines Tutorial* (visited Apr. 8, 2000) <<http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html>>.

parties and arbitrator always should be free to post the arbitral award on their respective websites. Eventually, individuals and institutions will begin collecting either the awards themselves or URLs to the awards and consolidating this data for the ease of researchers.⁸⁹ Ultimately, a few authoritative sources for arbitral awards will exist and become the preferred (although not the only) sources for this data.⁹⁰ Finally, by disbursing the sources of information about arbitral awards, we avoid the contentious issues of who owns the collective arbitral law of e-commerce and how to facilitate access to it.⁹¹

Attorneys and others are already going to the ICANN Search for Proceedings web page⁹² to try to gain some advantage in selecting which of the three dispute resolution providers' arbitration panels have been "historically" sympathetic of a given position. At this time, the paucity of arbitral awards, the varying fact patterns, and the number of arbitrators makes this a fruitless effort. But this does lead to two interesting questions regarding the use of these databases: how will the "publisher" of the arbitral awards index them and which search options will the publisher make available to the public? Depending on how the databases are established, users may or may not be able to use high-level statistical analysis across institutions, individual arbitrators, or arbitral panels in search of a house advantage. As the search engines become more sophisticated, this will become an invaluable resource for consumers to level the playing field.

⁸⁹ Although initially this ad hoc process sounds strange to attorneys practicing in the United States, where there is a defined and delineated hierarchy of reporters, in other parts of the world the compilation of reporters was left largely to the discretion of the parties before the court or parties potentially interested in the outcome of the litigation and was done on an ad hoc basis. See generally Burton M. Atkins, *Selective Reporting and the Communication of Legal Rights in England*, 76 JUDICATURE 58 (1992).

⁹⁰ Already, there are portal sites that aggregate (and sometimes vet) the URLs to relevant sites. Some of these sites also publish the full text of documents. Unfortunately, these sites are frequently transitory. Although the site may appear to be sponsored by a major institution, in reality, frequently these sites are merely the pet projects of individual employees and may not be maintained when the supporting employee moves on to other projects, changes employment, or faces other time constraints.

⁹¹ See generally Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173 (1998). The intellectual property issues surrounding publishing arbitral opinions in a global context are remarkably complex. This Article does not address these issues except to reiterate that there is a strong public interest in the publication and distribution of arbitral awards.

⁹² See ICANN Search for Proceedings Under the Uniform Domain Name Dispute Resolution Policy (May 5, 2000) <<http://www.icann.org/cgi-bin/udrp/udrp.cgi>>.

Creators of arbitral award databases should include, in addition to Boolean search capability, word frequency, and intelligent natural language queries. Further, the rules or syntax of the search should be intuitive, transparent, and whenever possible be similar to those used by popular search engines.

VII. CONCLUSION

Privacy in online arbitration is technologically possible, but public policy considerations may compel the evolution of arbitration in the online environment to an open online arbitration process. Arbitration in cyberspace may serve a role more akin to that of the existing state courts. For many, particularly consumers, it may be the primary or even only means of dispute resolution. If arbitration is to serve the needs of global e-commerce, it may need to evolve and to serve functions other than merely resolving the dispute of the parties before the arbitrator. Arbitration must serve the important public purpose of creating law and legitimizing the process of resolving disputes. If it is to serve that function, then the process, the award, and the reasoning behind the award must be transparent, as they must if they are to be accepted and respected as legitimate by the skeptical e-commerce community. Absent such transparency, arbitration is unlikely to create a coherent, consistent, and cogent body of customary law respected by both merchants, and consumers. Instead, online arbitration will be viewed with distrust by consumers, who do not understand it, and with disdain by e-merchants who have the sophistication to game the arbitral system. The situation will remain until online arbitration fixes itself or the nation-states intervene to protect the growth of e-commerce.

